

STATE OF WASHINGTON
DEPARTMENT OF COMMERCE

**REQUEST FOR QUALIFICATIONS AND QUOTATIONS
(RFQQ)**

NO. FY10-431ARRA

2010-11 ARRA Funded Weatherization Projects

NOTE:

This RFQQ will potentially result in multiple successful bidders who will compete among each other in a second tier bidding process for individual project contracts over the master contract period.

**STATE OF WASHINGTON
DEPARTMENT OF COMMERCE
OLYMPIA, WASHINGTON**

**REQUEST FOR QUALIFICATIONS AND QUOTATIONS
RFQQ NO. FY10-431ARRA**

PROJECT TITLE: 2010-11 ARRA Funded Weatherization Projects

BID DUE DATE: February 1, 2010

EXPECTED INDIVIDUAL CONTRACT AMOUNTS: Commerce expects to award multiple first tier contracts as a result of this RFQQ. These contractors will be part of a pool. Maximum amounts for each of these contracts will not exceed five hundred thousand dollars (\$500,000). However, actual expenditures under these contracts will be based on work subsequently identified by second tier solicitations and individual work statements issued.

Therefore, the \$500,000 amounts awarded under the first tier contracts may be amended at Commerce's sole discretion and based on work subsequently awarded in the second tier process.

The second tier process will involve contractor walk-throughs/evaluations of individual projects, subsequently selected by Commerce. Contractors will not be reimbursed for their costs incurred by participating in the second tier selection process.

EXPECTED TIME PERIOD FOR INDIVIDUAL CONTRACTS: Varies according to size and conditions of individual projects

EXPECTED TIMEFRAME FOR ALL CONTRACTS: February 4, 2010 - June 30, 2010

CONTENTS OF THE REQUEST FOR QUALIFICATIONS AND QUOTATIONS:

1. Introduction
2. Bid Contents
3. Evaluation and Award
4. Exhibits
 - A. ARRA Special Provisions
 - B. Field Order/Contract Terms and Conditions

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1 INTRODUCTION

1.1 PURPOSE AND BACKGROUND

Washington State Low-Income Weatherization Program received economic stimulus funding through the American Recovery and Reinvestment Act of 2009. We are currently conducting a six-month pilot project with private contractors for provision of weatherization services to state funded multiple dwelling low-income housing.

The purpose of this RFQQ is to solicit bids from contractors to become part of a pool that will bid in a second tier process for other projects as they come available between February 4, 2010 through June 30, 2011, to perform, or ensure the complete performance of, weatherization services on designated low-income multiple-family housing units according to the policies, procedures, and specifications in the Weatherization Manual For Managing the Low-Income Weatherization Program (available in PDF format on the Washington State Department of Commerce web site, <http://www.commerce.wa.gov/site/513/default.aspx>) and industry best practices.

1.2 OBJECTIVE

The objective of the proposed contract is to supplement the ARRA funded weatherization work performed by statewide nonprofit agencies and municipalities receiving ARRA weatherization funding through COMMERCE.

1.3 MINIMUM QUALIFICATIONS

1. The Contractor must have the capacity to begin work on February 4, 2010.
2. The Contractor must have a verifiable history of quality performance.
3. The Contractor must have five years experience working with both Federal and State public works projects and a complete understanding of all federal and state public work compliance requirements as established in the Joint-Federal State Standards, WAC 296-127-025, inclusive of filing weekly certified payroll records, adherence to the more stringent scopes of work and related prevailing wages, and all other federal and state requirements that apply to this work.
4. The Contractor must have five years experience working with, and/or subcontracting with specialty contractors to perform small, individual projects on behalf of public agencies, such as those that would utilize Small Works Rosters, Prequalification Processes, Job Order Contracting procedures or other similar types of contracting methods where individual projects may cost less than \$10,000.
5. The Contractor must have five years experience working with Women and Minority Owned Businesses and the ability to cover the bonds for these businesses should they bid successfully on all or part of given parts of this project.
6. The Contractor must have five years experience coordinating the work of subcontractors that meet or exceed the requirements for competency, quality, and compliance

requirements in accomplishing the tasks set forth in the Statement of Work.

7. The Contractor must have five years experience directly performing or subcontracting for residential insulation installation.
8. The Contractor must have five years experience directly performing or subcontracting for residential repairs to both supply and waste plumbing systems.
9. The Contractor must have five years experience directly performing or subcontracting for residential repairs or modifications to mechanical fan and vent systems.
10. The Contractor must have three years experience directly performing or subcontracting for residential weatherization services according to the policies, procedures, and specifications in the Weatherization Manual For Managing the Low-Income Weatherization Program.
11. The Contractor must be currently licensed to do business in the state of Washington, bonded and insured.
12. The Contractor must be available and willing to work or subcontract to qualified contractors in the I-5 corridor counties, which may include Clark, Cowlitz, Grays Harbor, King, Lewis, Mason, Pierce, Skagit, Snohomish, and Thurston, and/or Adams, Grant and Lincoln Counties.

Bidders, who do not meet these minimum qualifications will be rejected as non-responsive and will not receive further consideration. Any proposal that is rejected as non-responsive will not be evaluated or scored.

1.4 FUNDING

The maximum allowable amount for each awarded contract shall not exceed **\$500,000**.

Any contract(s) awarded as a result of this procurement is contingent upon the availability of funding.

1.5 PERIOD OF PERFORMANCE

The period of performance of any contract(s) resulting from this RFQQ is tentatively scheduled to begin on or about **February 4, 2010 and to end on June 30, 2011**. COMMERCE reserves the option at its sole discretion to extend the contract for an additional six-month period.

1.6 DEFINITIONS

Definitions for the purposes of this RFQQ include:

COMMERCE. The Department of Commerce, which is the agency of the state of Washington that is issuing this RFQQ.

Bidder. Individual, company, or firm submitting a proposal in order to attain a contract with COMMERCE.

Contractor. Individual or company whose proposal has been accepted by COMMERCE and is awarded a fully executed, written contract.

Bid. A formal bid submitted in response to this solicitation.

Request for Qualifications and Quotations (RFQQ). Formal procurement document in which services needed are identified and firms are invited to provide their qualifications to provide the services and their hourly rates.

2 BID CONTENTS

The two major sections of the bid are to be submitted in the order noted below:

Section 2.1 - Qualifications

Section 2.2 - Quotation

Bids must provide information in the same order as presented in this document with the same headings. This will not only be helpful to the evaluators of the bid, but should assist the Contractor in preparing a thorough response.

Items in this section marked “mandatory” must be included as part of the proposal for the proposal to be considered responsive, however, these items are not scored. Items marked “scored” are those that are awarded points as part of the evaluation conducted by the evaluation team.

2.1 QUALIFICATIONS SECTION

The Qualifications Section response is to be submitted in three sections as follows: 1) Business Information, 2) Experience, Staffing and Schedule, and 3) References.

2.1.1 BUSINESS INFORMATION (MANDATORY)

- A. State the name of the company, address, phone number, fax number, e-mail address, legal status of entity (ownership) and year entity was established as it now substantially exists.
- B. Provide the firm’s Federal Employer Tax Identification number or Social Security number and the Washington Uniform Business Identification (UBI) number issued by the state of Washington Department of Revenue.
- C. Indicate how many employees are with the firm. Name the firm principles and their roles.
- D. Identify any state employees or former state employees employed by the Contractor or on the Contractor’s governing board as of the date of the proposal. Include their position and responsibilities within the Contractor’s organization. If following a review of this information, it is determined by COMMERCE that a conflict of interest exists, the Contractor may be disqualified from further consideration for the award of a Contract.
- E. If the Contractor’s staff or subcontractor’s staff was an employee of the state of Washington during the past 24 months, or is currently a Washington State employee, identify the individual by name, the agency previously or currently employed by, job title or position held, and separation date.
- F. Demonstrate compliance with statutes and rules related to contracts or services.

- G. If the Contractor has had a contract terminated for default in the last five years, describe such incident. Termination for default is defined as notice to stop performance due to the Contractor's non-performance or poor performance and the issue of performance was either (a) not litigated due to inaction on the part of the Bidder, or (b) litigated and such litigation determined that the Bidder was in default.
- H. Submit full details of the terms for default, including the other party's name, address, and phone number. Present the Contractor's position on the matter. COMMERCE will evaluate the facts and may, at its sole discretion, reject the bid on the grounds of the past experience. If no such termination for default has been experienced by the Contractor in the past five years, so indicate.

2.1.2 QUALIFICATIONS

1. EXPERIENCE, STAFFING, AND SCHEDULE (SCORED)

A. Experience

Describe services provided by the Contractor that indicate the firm's ability to provide the services described in this RFQQ.

B. Staffing

Provide a description of the proposed project team structure and internal controls to be used during the course of the project, including any subcontractors you may want to include to complete your roster of services. Describe what services each would provide. Provide the information in Section 3.2.1 about each.

C. Schedule

Describe the firm's ability to meet deadlines described in this RFQQ, and give examples of how past tight deadlines have been successfully met.

2. REFERENCE (MANDATORY)

List names, addresses, telephone numbers, fax numbers and e-mail addresses of three business references for whom work has been accomplished and briefly describe the type of service provided for them. The Contractor must grant permission to COMMERCE to contact the references and others who may have pertinent information. Do not include current COMMERCE staff as references. COMMERCE may evaluate references at COMMERCE's discretion.

2.2 QUOTATIONS SECTION

2.2.1 IDENTIFICATION OF COSTS (SCORED)

A. Individually bid the following measures:

1. Install cellulose or fiberglass insulation in attics, walls and floors, and insulation support services on Washington State Low Income Weatherization job sites. Insulation support services include plumbing repairs, and electrical repairs, inspections and systems certification.
2. Perform air infiltration reduction measures and prioritize infiltration reduction tasks.
3. Identify and prioritize measures using a Minneapolis blower door fan depressurization system.

4. Perform air sealing and pressurization of both supply and return HVAC systems using a duct blaster to drive the air leakage reduction efforts.
5. Perform both supply and waste plumbing systems repairs as required to protect energy conservation measures.
6. Perform repair or modification of mechanical fan and vent systems as needed.

B. Describe your experience complying with state and federal regulations.

NOTE: All contractor travel must be included in costs and not added as a line item.

3 EVALUATION AND CONTRACT AWARD

3.1 EVALUATION PROCEDURE

Responsive bids will be evaluated strictly in accordance with the requirements stated in this solicitation and any addenda issued. The evaluation of bids shall be accomplished by an evaluation team to be designated by COMMERCE, which will determine the ranking of bids.

3.2 CLARIFICATION OF BID

The RFQQ Coordinator may contact the Contractor for clarification of any portion of the Contractor's bid.

3.3 EVALUATION WEIGHTING AND SCORING

The following weighting and points will be assigned to the bid for evaluation purposes:

Qualifications Section – 80%	80 pts
Sec. 2.1.2 (A) Firm Experience - 45 points (maximum)	
Sec. 2.1.2 (B) Staff Qualifications - 25 points (maximum)	
Sec. 2.1.2 (C) Schedule - 10 points (maximum)	
Quotation Section – 20%	20 pts
Grand Total	<u>100 Pts</u>

3.4 NOTIFICATION TO SUCCESSFUL BIDDER(S), NOTIFICATION TO UNSUCCESSFUL BIDDERS, AND PROTEST PROCEDURE

All notifications, **successful bid, unsuccessful bid and protest procedure, will be made by the Washington State Department of General Administration, which administers WEBS. Following is contact information for questions regarding notifications:**

Contacting Department of General Administration

Hours: 8:00 a.m. to 5:00 p.m. PST, Monday – Friday*

Phone: (360) 902-7400

Email: webcustomerservice@ga.wa.gov

*Messages received after hours will be responded to on the next business day

4 RFQQ EXHIBIT

- Exhibit A Field Order Terms and Conditions

ADDITIONAL PROVISIONS UNDER THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009
Public Law 111-5

1. Recovery Act Reporting Requirements; Section 1512(c) of the Recovery Act

Contractor acknowledges and agrees that the American Recovery and Reinvestment Act of 2009, hereinafter "Recovery Act" places great emphasis on accountability and transparency in the use of taxpayer dollars. Among other things, it creates a new Recovery Accountability and Transparency Board and a new website -- Recovery.gov -- to provide information to the public, including access to detailed information on grants and contracts made with Recovery Act funds.

COMMERCE, as a recipient of Recovery Act funds, must comply with the Recovery Act's extensive reporting requirements, including quarterly financial and programmatic reporting due within 10 calendar days after the end of each calendar quarter. COMMERCE will require periodic reports from its sub-recipients in order to fulfill its reporting obligations. Grantees receiving Recovery Act funds may expect that a standard form(s) and/or reporting mechanism will be made available at a future date.

Contractor agrees to provide to COMMERCE all reports, documentation, or other information, as may be required by COMMERCE to meet reporting obligations under the Recovery Act. Grantee's receipt of funds is contingent on Grantee meeting the reporting requirements of Section 1512.

Additional instructions and guidance regarding the required reporting will be provided as they become available. For planning purposes, however, Contractors receiving Recovery Act funds should be aware that Recovery Act section 1512(c) provides:

Recipient Reports- Not later than 10 days after the end of each calendar quarter, each recipient that received recovery funds from a Federal agency shall submit a report to that agency that contains—

- (1) The total amount of recovery funds received from that agency;**
- (2) The amount of recovery funds received that were expended or obligated to projects or activities; and**
- (3) A detailed list of all projects or activities for which recovery funds were expended or obligated, including:**
 - (a) The name of the project or activity;**
 - (b) A description of the project or activity;**
 - (c) An evaluation of the completion status of the project or activity;**
 - (d) An estimate of the number of jobs created and the number of jobs retained by the project or activity; and**
 - (e) For infrastructure investments made by State and local governments, the purpose, total cost, and rationale of the agency for funding the infrastructure investment with funds made available under this Act, and name of the person to contact at the agency if there are concerns with the infrastructure investment.**
- (4) Detailed information on any subcontracts or subgrants awarded by the recipient to include the data elements required to comply with the Federal Funding Accountability and Transparency Act of 2006 (Public Law 109-282), allowing aggregate reporting on awards below \$25,000 or to individuals, as prescribed by the Director of the Office of Management and Budget.**

2. Section 1602 of the Recovery Act: Preference for Quick-Start Activities (if applicable)

Section 1602 of the Recovery Act provides:

ADDITIONAL PROVISIONS UNDER THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009
Public Law 111-5

In using funds made available in this Act for infrastructure investment, recipients shall give preference to activities that can be started and completed expeditiously, including a goal of using at least 50 percent of the funds for activities that can be initiated not later than 120 days after the date of the enactment of this Act. Recipients shall also use grant funds in a manner that maximizes job creation and economic benefit.

3. Wage Rate Requirements under Section 1606 of the American Recovery and Reinvestment Act of 2009 – Davis-Bacon Act

All laborers and mechanics employed by contractors and subcontractors on projects funded directly by or assisted in whole or in part by and through the Federal Government pursuant to the Recovery Act, shall be paid wages at rates not less than those prevailing on projects of a character similar in the locality as determined by the Secretary of Labor in accordance with subchapter IV of chapter 31 of title 40, United States Code (Davis-Bacon Act). With respect to the labor standards specified in this section, the Secretary of Labor shall have the authority and functions set forth in Reorganization Plan numbered 14 of 1950 (64 Stat. 1267, 5 U.S.C. App.) and section 3145 of title 40 United States Code. See U.S. Department of Labor, Wage and Hour Division website at <http://www.dol.gov/esa/whd/contracts/dbra.htm> . Wage determinations can be found at <http://www.wdol.gov>.

The Contractor shall include this provision and require this provision to be contained in all subcontracts for work performed under this Contract.

The work performed by this contract may also be subject to the State's prevailing wage laws, Chapter 39.12 RCW. The Contractor is advised to consult with the Washington State Department of Labor and Industries to determine the prevailing wages that must be paid.

4. Protection of Whistleblowers

Prohibition on Reprisals: An employee of any non-Federal employer receiving covered funds under the Recovery Act may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing, including a disclosure made in the ordinary course of an employee's duties, to the Accountability and Transparency Board, an inspector general, the Comptroller General, a member of Congress, a State or Federal regulatory or law enforcement agency, a person with supervisory authority over the employee (or other person working for the employer who has the authority to investigate, discover or terminate misconduct,) a court or grant jury, the head of a Federal agency, or their representatives information that the employee believes is evidence of:

- Gross mismanagement of an agency contract or grant relating to covered funds;
- Gross waste of covered funds;
- Substantial and specific danger to public health or safety related to the implementation or use of covered funds;
- Abuse of authority related to the implementation or use of covered funds; or
- Violation of law, rule, or regulation related to an agency contract (including the competition for or negotiation of a contract) or grant, awarded or issued relating to covered funds.

Any employer receiving covered funds shall post notice of the rights and remedies provided under this section. The recommended written notice is attached as "Know Your Rights Under the Recovery Act."

ADDITIONAL PROVISIONS UNDER THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009
Public Law 111-5

5. False Claims Act

Each grantee or subrecipient should promptly refer to an appropriate inspector general any credible evidence that a principal, employee, agent, contractor, subgrantee, subcontractor or other person has submitted a false claim under the False Claims Act or who has committed a criminal or civil violation of laws pertaining to fraud, conflict of interest, bribery, gratuity or similar misconduct involving those funds.

6. Listing Recovery Act Jobs with the Washington State Employment Security Department

This Contract is funded with federal stimulus funds (under the Recovery Act), which has strict reporting requirements for funds spent and jobs created or retained (see Exhibit A, attached and incorporated into this Contract as additional instructions). Unless hiring is directly from a union hall, all job openings created by the Contractor for this project must be listed with the WorkSource system (an affiliate of the Employment Security Department) before hiring; all hiring decisions also must be reported to WorkSource. In addition, all Subcontractors hired by the Contractor also must be required to list jobs and report hiring results to WorkSource. Existing Contractor or Subcontractor employees who are retained using funds from this project also must be reported to WorkSource.

WorkSource will pre-screen and refer qualified job candidates for the Contractor's or Subcontractor's consideration. The Contractor and Subcontractor also have the discretion to use other, additional recruitment systems and retain the right to make all hiring decisions.

To begin the listing and reporting process, contact the Employment Security Department ARRA Business Unit at 877-453-5906 (toll-free), 360-438-4849, or ARRA@esd.wa.gov.

Exhibit A

How to list ARRA jobs with the Employment Security (ESD) WorkSource system

To help with the increased transparency and accountability that are required under the American Recovery & Reinvestment Act (ARRA), ESD's ARRA Business Unit will be the central point of contact for state agencies and their contractors for listing and tracking ARRA-funded jobs.

Step 1: State agencies notify ESD about ARRA-funded contracts

Within 2 days after awarding an ARRA-funded contract, state agencies should provide the following information to Employment Security's ARRA Business Unit:

- Name, phone number and address of contractor
- Title or short description of the contract

Report this information to ESD's ARRA Business Unit at ARRA@esd.wa.gov, 877-453-5906 (toll-free) or 360-438-4849. (Employment Security will use the information to verify that contractors comply with the requirement stated in Step 2.)

Step 2: List ARRA-funded jobs with ESD's WorkSource system

State agencies, contractors and sub-contractors should contact the ARRA Business Unit to begin the process of listing their ARRA-funded jobs with the WorkSource system. The ARRA Business Unit may be reached at 877-453-5906 (toll-free), 360-438-4849 or ARRA@esd.wa.gov.

Here's what we'll do with the information: The ARRA Business Unit will relay the information to a business outreach lead at a WorkSource office in the employer's community. The business outreach lead will contact the employer to obtain the information necessary to list the job/s (create a "job order"), and to discuss the employer's recruitment needs and the services available through WorkSource.

The WorkSource business outreach lead will search the agency's database for qualified applicants (based on job-skill requirements), screen potential applicants, and refer selected candidates to the employer for consideration. (Employers retain the right to use other or additional recruitment systems, and they make all hiring decisions.)

Step 3: Report hiring information

After completing the hiring process, the employer should contact the WorkSource business outreach lead to "close" the job order and provide the following information:

- Job title
- Number of people hired
- Starting wage and hours

This information will be used in reports and status updates to the governor, the federal government and the public.



Frequently asked questions for ARRA employers

Q1. What services can I get when I list jobs with WorkSource?

- A.** WorkSource staff screens and refers job seekers based on how well their skills meet your job requirements. The screening is done broadly or narrowly, depending on how many people you want to interview.

WorkSource also can help you with free job advertising, pay-rate information, tax credits and information on employment laws and regulations. We're committed to helping your business succeed.

Q2. What screening and assessment of skills does WorkSource conduct?

- A.** We conduct a variety of screening and assessment. Contact your local WorkSource center to ask what assessment services are provided.

Q3. If the position requires a certain skill level, can WorkSource test applicants for math and reading levels or typing speed?

- A.** WorkSource staff will pre-screen applicants based on the qualifications that you need. Ask your WorkSource staff person about their ability to assess certain skills required for the position.

Q4. Can we conduct interviews at WorkSource?

- A.** You can use space at WorkSource for mass application sessions, one-on-one interviews, or even group orientations. Contact your local WorkSource to check availability.

Q5. What is the anticipated hiring time?

- A.** We recommend you plan ahead (7-10 days), although you may hire when you choose. The job will be listed for you right away.

Q6. What if WorkSource doesn't have job seekers with the skills and abilities that match our needs?

- A.** WorkSource staff will look first for qualified local applicants. If no one is available, then the search is expanded to include other areas to see if applicants are willing to commute or relocate. During this recession, there is an unprecedented pool of qualified applicants. Our matching system has the unique capabilities to match skilled job seekers with available jobs.

Q7. Is WorkSource able to coordinate job fairs or hiring events?

- A.** Yes, WorkSource often coordinates large job fairs and targeted hiring events. Your local WorkSource staff can arrange the details such as date, availability of space, and the amount of time they need to help coordinate your hiring event.
- Q8. Do I have to list jobs and report hiring information to WorkSource?**
- A.** Yes. Even if you hire someone who already works for you in a different position, report the hire for contract requirements.
- Q9. Can I list my job opening with other sources like temp agencies or run a classified ad in the newspaper at the same time?**
- A.** You may recruit as broadly as you like. Just remember that a requirement of your contract is to post contract-funded job openings with your WorkSource business representative and report all hiring information.
- Q10. What information is being tracked by WorkSource?**
- A.** WorkSource tracks information about jobs listed, job candidates referred and the job openings filled.
- Q11. Who is the information being provided to?**
- A.** Participation and performance information is provided by the Employment Security Department to the U.S. Department of Labor. It also is being reported to the Governor, who is required by the federal Office of Management and Budget to report about jobs preserved and created during the recession.
- Q12. How long after placing the job order with WorkSource will it take before I can interview applicants?**
- A.** It could happen the same day if there are interested, qualified job seekers who apply right away. Typically, it may take a few days.
- Q13. What if I already have a job candidate (or a list of candidates), why do I have to list my jobs with WorkSource?**
- You can hire anyone you want, but you need to report it to us. Listing your stimulus-funded jobs with WorkSource enables us to track how many jobs are created and filled. We will relay the information to the governor and the federal government, who are documenting the effects of the stimulus funding.

Know Your Rights Under the Recovery

Act! *Did you know?*

The American Recovery and Reinvestment Act of 2009 ¹provides protections for certain employees of non-federal employers who make specified disclosures relating to possible fraud, waste and/or abuse of Recovery Act funds. *Who is protected?* Employees of non-federal employers receiving recovery funds. This includes State and local governments, contractors, subcontractors, grantees or professional membership organizations acting in the interest of recovery fund recipients. *How are Whistleblowers Protected?* You cannot be discharged, demoted or otherwise discriminated against as a reprisal for making a protected disclosure. *What types of disclosures are protected?* The disclosure must be made by the employee to the Recovery Accountability and Transparency Board, an Inspector General, the Comptroller General, a member of Congress, a state or federal regulatory or law enforcement agency, a person with supervisory authority over the employee, a court or grand jury, or the head of a federal agency or his/her representatives. The disclosure must involve information that the employee believes is evidence of:

¹Section 1553 of Division A, Title XV of the American Recovery and Reinvestment Act of 2009, P.L. 111-5

- gross mismanagement of an agency contract or grant relating to recovery funds;
- a gross waste of recovery funds;
- a substantial and specific danger to public health or safety related to the implementation or use of recovery funds;
- an abuse of authority related to the implementation or use of recovery funds; or
- a violation of law, rule, or regulation related to an agency contract or grant awarded or issued relating to recovery funds.

Take Action! Log on to Recovery.gov for more information about your rights and details on how to report at www.recovery.gov.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

THE DIRECTOR

October 7, 2009

M-10-02

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: Peter R. Orszag

Director

SUBJECT: Guidance on section 163 of the Continuing Resolution regarding the Association of Community Organizations for Reform Now (ACORN)

This memorandum provides guidance to Executive Branch agencies regarding the implementation of section 163 of the Continuing Appropriations Resolution, 2010, Division B of Pub. L. No. 111-68 (CR), which states:

SEC. 163. None of the funds made available by this joint resolution or any prior Act may be provided to the Association of Community Organizations for Reform Now (ACORN), or any of its affiliates, subsidiaries, or allied organizations.

Your agency must immediately commence all necessary and appropriate steps to comply with section 163. This includes the following:

- No future obligations of funds. No agency or department should obligate or award any Federal funds to ACORN or any of its affiliates, subsidiaries or allied organizations (collectively "affiliates") during the period of the CR. To the extent your agency already has determined that funds should be obligated or awarded to ACORN or its affiliates but has not yet entered into any agreement to provide such funds to ACORN or any of its affiliates, your agency should not provide such funds, or enter into any such agreements to do so. As section 163 makes clear, its prohibition applies not only to the funding that is made available by the CR, but also to the funding that was made available by previously enacted statutes. In addition, the text of section 163 is sufficiently broad to cover funding that was made available for fiscal year (FY) 2009 and prior fiscal years, as well as funding that is or will be made available for FY10.
- Suspension of grant and contractual payments. If your agency has an existing contract or grant agreement with ACORN or its affiliates, the agency should: (i) where permissible, immediately suspend performance of any obligations under the contract or agreement, including payment of Federal funds; and (ii) consult promptly with the agency's general counsel and, if necessary, the Office of Management and Budget.

ADDITIONAL PROVISIONS UNDER THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009
Public Law 111-5

No funding of ACORN and its affiliates through Federal grantees or contractors. Your agency should take steps so that no Federal funds are awarded or obligated by your grantees or contractors to ACORN or its affiliates as subgrantees, subcontractors, or other subrecipients. Because section 163 states that “[n]one of the funds . . . may be provided,” this prohibition applies not only to a direct recipient of Federal funds but also to a subrecipient (e.g., a subcontractor, subgrantee, or contractor of a grantee). We recommend that your agency:

- o notify all Federal grant and contract recipients of the prohibition contained in section 163, and provide them with a copy of this guidance document; and

- o advise all Federal grant and contract recipients (a) not to provide Federal funds to ACORN or its affiliates as subgrantees, subcontractors or other subrecipients, consistent with this guidance, and (b) to notify your agency of any existing subgrants, subcontracts or other subrecipient agreements with ACORN or its affiliates and of how the grantee or contractor is planning to comply with the prohibition with respect to those subgrants, subcontracts or subrecipient agreements.

If you have any questions concerning this memorandum, please contact Preeta D. Bansal, OMB General Counsel and Senior Policy Advisor, at OGC@omb.eop.gov.

**WASHINGTON STATE DEPARTMENT OF COMMERCE
FIELD ORDER/CONTRACT STANDARD TERMS AND CONDITIONS (T'S & C'S)
Revised 02/24/00**

The terms and conditions in this section apply to all invitations to bid and requests for proposals and requests for quotations except as noted.

1. ENTIRE AGREEMENT

This document, including all addenda and subsequently issued change notices, comprises the entire agreement between the State of Washington and the Contractor and shall be governed by the laws of the State Of Washington incorporated herein by reference. The venue for legal action shall be the Superior Court for the State of Washington, County of Thurston. The state reserves the right to reject bids that propose alternate or additional terms and conditions.

2. CONFLICT AND SEVERABILITY

Conflict: In the event of conflict between contract documents and applicable laws, codes, ordinances or regulations, the most stringent or legally binding requirement shall govern and be considered a part of this contract to afford the state maximum benefits.

Severability: Any provision of this document found to be prohibited by law shall be ineffective to the extent of such prohibition without invalidating the remainder of the document.

3. ANTITRUST

The state maintains that, in actual practice, overcharges resulting from antitrust violations are borne by the purchaser. Therefore, the Contractor hereby assigns to the state any and all claims for such overcharges except overcharges which result from antitrust violations commencing after the price is established under this contract and which are not passed on the state under an escalation clause.

4. NONDISCRIMINATION

A. Employment:

Acceptance of this contract binds the Contractor to the Terms and Conditions of Section 601, Title VI, Civil Rights Act of 1964, as may be amended: In that "No person in the United States shall, on the grounds of race, color, national origin, sex, or age, be excluded from participation, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance." In addition, "No otherwise qualified handicapped individual in the United States shall, solely by reason of his handicap, be excluded from the participation, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Unless exempted by Presidential Executive Order #11246, as may be amended or replaced and applicable regulations thereunder, Contractor shall not discriminate against any employee or applicant for employment.

B. Contracting:

Contractors, Bidders, and Proposers shall not create barriers to open and fair opportunities for all businesses including MWBE's to participate in all State contracts and to obtain or compete for contracts and subcontracts as sources of supplies, equipment, construction, and services. In considering offers from and doing business with subcontractors and suppliers, the Contractor shall not discriminate on the basis of race, color, creed, religion, sex, age,

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nationality, marital status, or the presence of any mental, or physical disability in an otherwise qualified disabled person.

5. WORKERS RIGHT TO KNOW

Recently passed "right to know" legislation required the Department of Labor and Industries to establish a program to make employers and employees more aware of the hazardous substances in their work environment. WAC 296-62-054 requires among other things that all manufacturers/distributors of hazardous substances, including any of the items listed on the IFB, RFQ or contract bid and subsequent award, must include with each delivery completed Material Safety Data Sheets (MSDS) for each hazardous material. Additionally, each container of hazardous material must be appropriately labeled with:

- The identity of the hazardous material,
- Appropriate hazardous warnings, and
- Name and address of the chemical manufacturer, importer, or other responsible party

Labor and Industries may levy appropriate fines against employers for noncompliance and agencies may withhold payment pending receipt of a legible copy of the MSDS. It should be noted that OSHA Form 20 is not acceptable in lieu of this requirement unless it is modified to include appropriate information relative to "carcinogenic ingredients" and "routes of entry" of the product(s) in question.

6. GIFTS AND GRATUITIES

In accordance with RCW 43.19.1937 and 1939 and RCW 42.52.150 and 160, it is unlawful for any person to directly or indirectly offer, give or accept gifts, gratuities, loans, trips, favors, special discounts, services or anything of economic value in conjunction with state business practices to another to refrain from submitting a proposal. Further RCW 43.19.1937 and the Ethics in Public Service Law, Chapter 42.52 RCW prohibits state officers or employees from receiving, accepting, taking or seeking gifts (except as permitted by RCW 42.52.150) if the officer or employee participates in contractual matters relating to the purchase of goods or services.

7. RIGHTS AND REMEDIES

In the event of any claim for default or breach of contract, no provision in this document or in the bidder's offer shall be construed, expressly or by implication, as a waiver by the state of any existing or future right and/or remedy available by law. Failure of the state to insist upon the strict performance of any term or condition of the contract or to exercise or delay the exercise of any right or remedy provided in the contract or by law, or the acceptance of (or payment for) materials, equipment or services, shall not release the Contractor from any responsibilities or obligations imposed by this contract or by law, and shall not be deemed a waiver of any right of the state to insist upon the strict performance of the contract.

8. INSTATE PREFERENCE-RECIPROCITY (This paragraph does not apply to requests for quotations) Pursuant to RCW 43.19.702 the Department of General Administration has established a schedule of penalties applicable against firms submitting bids from states which

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grant a preference to their own in-state businesses. The penalties are listed below and apply only to bids received from the following states:

Alaska	5%	Ohio	5%
California*	5%	S. Carolina	7% (only when price of single item does not exceed \$30,000)
Hawaii	3%	South Dakota	5% (milk only)
Illinois	10% (coal only)	Virginia	4% (coal only)
Iowa	5% (coal only)	West Virginia	5%
Louisiana	7%	Wyoming	5%
Montana	3%		
New Mexico	5%		
New York	3% (food only)		

*California is applicable only to small business firms certified for preference by the State of California and located in distressed areas and enterprise zones. Bidders from California must indicate on their bid whether certified as a small business under California Code, Title 2, Section 1982.12 at Section VIII, Attachment 1, Bid Information.

In determining the lowest responsible bidder, the State Procurement Officer will add an amount equal to the above percentage to each applicable bid submitted. In no event shall such increase be paid to a contractor whose bid is accepted.

9. PROTESTS

Protests shall be filed and resolved in accordance with Washington Administrative Code (WAC) 236-48-141 through 143. Protests filed prior to award are to be addressed to the SPO in charge of the bid. Protests filed after the award, and in accordance with above referenced WAC, are to be addressed to the Assistant Director, Office of State Procurement.

10. SAVE HARMLESS

To the fullest extent permitted by law, Contractor shall indemnify, defend, and save harmless the state, agencies of the state, and all officers and employees of the state, from and against any and all claims for injuries or death, including claims by Contractor's employees, or for damages arising out of, resulting from, or incident to Contractor's performance or failure to perform the contract, or for patent, trademark, copyright, or franchise infringement arising from the purchase, installation, or use of goods and services ordered. Contractor's obligation to indemnify, defend and save harmless shall not be eliminated or reduced by any alleged concurrent negligence of the state or its agencies, employees, and officers. Contractor waives its immunity under Title 51 RCW to the extent required to indemnify, defend, and save harmless the state and its agencies, officers or employees.

11. PERSONAL LIABILITY

It is agreed by and between the parties hereto that in no event shall any official, officer, or employee or agent of the State of Washington be in any way personally liable or responsible for any covenant or agreement herein contained whether expressed or implied, nor for any statement or representation made herein or in any connection with this agreement.

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12. SUPERVISION AND COORDINATION

Contractor shall:

- Competently and efficiently supervise and direct the implementation and completion of all contract requirements specified herein.
- Designate in its bid to the state, a representative(s) with the authority to legally commit Contractor's firm. All communications given or received from the Contractor's representative shall be binding on the Contractor.
- Promote and offer to Purchasers only those materials, equipment and/or services as stated herein and allowed for by contractual requirements. Violation of this condition will be grounds for contract termination.

13. ADVERTISING

Contractor shall not advertise or publish information concerning this contract in any form or media without prior written consent from the SPO.

14. SUBCONTRACTS/ASSIGNMENT

Contractor shall not subcontract or assign its obligations under this contract without the prior written consent of the SPO. The Contractor shall be responsible to ensure that all requirements of the contract shall flow down to any and all subcontractors.

15. TAXES, FEES AND LICENSES

Taxes: Where required by state statute or regulation, contractor shall pay for and maintain in current status and all taxes that are necessary for contract performance. Unless otherwise indicated, the purchaser agreed to pay State of Washington sales or use taxes on all applicable consumer services and materials purchased. No charge by contractor shall be made for federal excise taxes and the purchaser agrees to furnish contractor with an exemption certificate where appropriate. Sales tax shall not be included in bid pricing submitted.

Collection of Retail Sales Tax:

- In-state suppliers: In general, in-state suppliers engaged in retail sales activities with Washington State are required to collect and remit sales to Department of Revenue.
- Out-of-state suppliers: In general, out-of-state suppliers must collect and remit "use tax" to Department of Revenue if the activity carried on by the seller in Washington State is significantly associated with supplier's ability to establish or maintain a market for its products in Washington State. Examples of such activity include where the supplier either directly or by an agent or other representative:
 - a) Maintains an in-state office, distribution house, sales house, warehouse, service enterprise, or any other in-state place of business; or
 - b) Maintains an in-state inventory or stock of goods for sale; or
 - c) Regularly solicits orders from customers located within state via sales representatives entering the state; or
 - d) Sends other staff into the state (e.g., product safety engineers, etc.) to interact with customers in an attempt to establish or maintain market(s); or
 - e) Other factors identified in WAC chapter 458-20.

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Out-of-state suppliers meeting one of the above criteria must register and establish an account with the Department of Revenue (DOR). Refer to WAC 458-20-193 (7 through 9) or call Department of Revenue at (800) 647-7706. When out-of-state suppliers are not required to collect and remit "use tax," the agency is responsible for paying this tax, if applicable, directly to DOR.

Fees/Licenses: Prior to bid opening the Contractor shall pay for and maintain in a current status, any license fees, assessments, permit charges, etc., which are necessary for contract performance. It is the contractor's sole responsibility to monitor and determine any changes or the enactment of any subsequent regulations for said fees, assessments or charges and to immediately comply with said changes or regulations during the entire term of this contract.

Customs/Brokerage Fees: To be considered responsive, bid must include ALL customs duties, brokerage or import fees where applicable. Contractor shall take all necessary actions to ensure that materials or equipment purchased are expedited through customs. Failure to do so may subject contractor to liquidated damages as identified in the document and/or to other administrative actions considered appropriate.

16. WARRANTIES

Product: Contractor warrants that all materials, equipment and/or services provided under this contract shall be fit for the purpose(s) for which intended, for merchantability, and shall conform to the requirements and specifications herein. Acceptance of any service and inspection incidental thereto by the state shall not alter or affect the obligations of the Contractor or the rights of the state.

Price: Contractor warrants that prices of materials, equipment, and services set forth herein do not exceed those charged by the Contractor to any other customer purchasing the same goods or services under similar conditions and in like or similar quantities.

Year 2000 Compliance Warranty: Contractor warrants fault-free performance in the processing of date and date-related data including, but not limited to, calculation, comparing, and sequencing by all Equipment and Software provided pursuant to the Contract, individually and in combination, when used in accordance with the product documentation provided by the Contractor. Fault-free performance shall include the manipulation of this data when dates are in the 20th or 21st centuries and shall be transparent to the user.

17. LIENS, CLAIMS AND ENCUMBRANCES

All materials, equipment or services shall be free of all liens, claims or encumbrances of any kind and, if the state requests, a formal release of same shall be delivered to the state.

18. DELIVERY

A. Time:

Delivery must be made during normal work hours and within time frames proposed by Bidder herein and subsequently accepted by the state. Failure to comply may subject Contractor to nondelivery assessment charges and/or liquidated damages as appropriate. The state reserves the right to refuse shipment when delivered after normal working

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hours. Contract shall verify specific working hours of individual agencies and so instruct carrier(s) to deliver accordingly. The acceptance by the purchaser of late performance with or without objection or reservation by the purchaser shall not waive the right to claim damage for such breach, nor preclude the purchaser from pursuing any other remedy provided herein, including termination, nor constitute a waiver of the requirements for the timely performance of any obligation remaining to be performed by Contractor.

B. Terms:

Unless otherwise specified, all goods are to be shipped FOB Destination freight prepaid and included. Where specific authorization is granted to ship goods FOB shipping point, Contractor agrees to prepay all shipping charges, route as instructed or, if instructions are not provided, route by cheapest common carrier. Each invoice for shipping charges shall contain the original or a copy of the freight bill indicating that the payment for shipping has been made. The purchaser reserves the right to refuse COD shipments.

- B. Location:** All deliveries are to be made to the applicable delivery location in accordance with Interstate Commerce Commission rules or as indicated in the purchase order. When applicable, Contractor shall take necessary actions to safeguard items during inclement weather.
- C. Unauthorized:** In no case shall Contractor initiate performance prior to receipt of written or verbal authorization from authorized purchasers. Expenses incurred otherwise shall be borne solely by the Contractor.

19. INSPECTION AND REJECTION

The Purchaser's inspection of all materials and equipment upon delivery is for the sole purpose of identification. Such inspection shall not be construed as final acceptance, or as acceptance of the materials or equipment, if materials or equipment does not conform to contractual requirements. If there are any apparent defects in the materials or equipment at the time of delivery, the Purchaser will promptly notify the Contractor thereof. Without limiting any other rights, the Purchasing and/or the state, at its option, may require the Contractor to:

- Repair or replace, at Contractor's expense, any or all of the damaged goods, or
- Refund the price of any or all of the damaged goods, or
- Accept the return of any or all of the damaged goods.

20. TITLE AND RISK OF LOSS

Regardless of FOB point, Contractor agrees to bear all risks of loss, injury, or destruction of goods and materials ordered herein which occur prior to delivery and acceptance. Such loss, injury or destruction shall not release Contractor from any obligation hereunder.

21. PERFORMANCE

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Acceptance by the purchaser of unsatisfactory performance with or without objection or reservation shall not waive the right to claim damage for breach, or terminate the contract, nor constitute a waiver of requirements for satisfactory performance of any obligation remaining to be performed by Contractor.

22. IDENTIFICATION

All invoices, packing lists, packages, instruction manuals, correspondence, shipping notices, shipping containers, and other written documents affecting this contract shall be identified by the applicable purchase order or field order number. Packing lists shall be enclosed with each shipment, indicating the contents therein.

23. CHARGES FOR HANDLING

No charges will be allowed for handling that includes but is not limited to packing, wrapping, bags, containers, or reels, unless otherwise stated herein.

24. INVOICING

Contractor shall provide an original and two (2) copies of invoices. Each invoice shall be submitted as required by the contract and shall reference the contract and field order or purchase order number. Invoices shall be properly annotated with applicable prompt payment discount(s).

25. PAYMENT

Payment will be made by the state agency or political subdivision indicated on the ordering document. Any bid that requires payment in less than thirty (30) calendar days need not be considered. Qualifying prompt payment discount will be considered in determining the apparent lowest responsible and responsive bid. Invoices will not be processed for payment nor will the period of cash discount commence until receipt of a properly completed invoice and until all invoiced items are received and satisfactory performance of Contractor has been attained. If an adjustment in payment is necessary due to damage or dispute, the cash discount period shall commence on the date final approval for payment is authorized. Under "Chapter 39.76 RCW," if purchaser fails to make timely payment(s), Contractor may invoice for 1% per month on the amount overdue or a minimum of \$1.00. Payment will not be considered late if a check or warrant is mailed within the time specified. If no terms are specified, net 30 days will automatically apply. Payment(s) made in accordance with contract terms shall fully compensate the Contractor for all risk, loss, damages or expense of whatever nature and acceptance of payment shall constitute a waiver of all claims submitted by Contractor.

Payment for materials or equipment received or for services rendered shall be made by warrant issued from the Washington State Treasury and redeemable in U.S. dollars. Unless otherwise indicated, the state's sole responsibility shall be to issue this warrant. Any bank or transaction fees or similar costs associated with currency exchange procedures shall be fully assumed by the contractor.

26. QUALITY STANDARDS

Product or service specifications herein are intended solely to clearly describe type and quality and not to be restrictive. Trade reference specifications describe the type product thus far found to best meet agency functional requirements and provide the most economical use life under

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agency use situations. So as not to misrepresent the requirements herein, brands other than those specified will therefore be considered on the basis of whether at least equal in quality/performance. Failure to submit with bid complete documentation sufficient to establish products bid as at least equal may be grounds for rejection. By submitting bid, bidder expressly warrants product bid as at least equal in quality and performance. The state's acceptance of a product bid as an "equal" is conditioned on the state's inspection and testing after receipt. If, in the sole judgment of the state, the item is determined not to be equal, the bid may be rejected or the product returned at bidder's expense and/or the contract canceled without any liability whatsoever to the state. Any bid containing a brand that is not of equal quality, performance or use specified must be represented as an "alternate" and not as an "equal;" failure to do so shall be sufficient reason to consider the bid nonresponsive.

27. DETERMINATION OF RESPONSIBILITY

- A. During bid evaluation, the state reserves the right to make reasonable inquiry to determine the responsibility of any bidder. Requests may include, but not be limited to, financial statements, credit ratings, references, record of past performance, on-site inspection of bidder's, or bidder's subcontractor's facilities. Failure to respond to said request(s) will be sufficient reason to consider the bid nonresponsive.
- B. During the contract term, should the contractor be determined to be in violation of federal, state, or local laws or regulations, the state reserves the right to modify its initial determination of responsibility at the time of award and to take other action as determined appropriate, including but not limited to termination of the contract.

28. AWARD FACTORS

A. Criteria: State contracts shall be awarded to the lowest responsible bidder subject to the preferences provided by law. Award criteria shall include all factors identified in RCW 43.19.1922 and WAC 236-48-093 and the contractual requirements provided herein. No MWBE preference will be included in the evaluation of bids/proposals, no minimum level of MWBE participation shall be required as a condition for receiving an award and bids/proposals will not be rejected or considered non-responsive on that basis.

B. Rights Reserved (this subparagraph does not apply to request of quotations): Subject to the provisions of Chapter 69, Laws of 1996 (SSB 6572), the state reserves the right to:

- 1. Waive any informality
- 2. Reject any or all bids, or portions thereof. WAC 236-48-094 allows the state to "accept any portion of the items bid" unless the bidder stipulates all or nothing on the bid.
- 3. Reissue an IFB, RFQ, or RFP, or negotiate under provisions outlined therein
- 4. Award an all-or-none consolidated basis taking into consideration reduction in administrative costs as well as unit bid prices

29. SUPPLIER REGISTRATION

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Prior to award of a contract, any unregistered bidder may be required to complete a Supplier Registration Packet for placement on the state's supplier list.

30. CHANGES

No alternation in any of the terms, conditions, or contractual requirements herein shall be effective without the written consent of the SPO as evidenced by issuance by the state of a contract change notice.

31. ADDITIONS OR DELETIONS

The state reserves the right to add or delete items, agencies or locations, as determined to be in the best interest of the state. Added items, agencies or locations will be related to those on contract and additions or deletions will not represent a significant increase or decrease in size or scope of the contract. Such additions or deletions will be by mutual agreement, will be at prices consistent with the original bid price margins, and will be evidenced by issuance of a written contract change notice from the SPO.

32. CONTRACT SUSPENSION

The state may at any time and without cause, suspend the contract or any portion thereof, for a period of not more than thirty (30) calendar days, by written notice to the Contractor. Contractor shall resume performance within fifteen (15) calendar days of written notice from the state.

33. BREACH, DEFAULT TERMINATION

A. Breach: A breach of a term or condition of the contract shall mean any one or more of the following events: (1) Contractor fails to perform the services by the date required or by a later date as may be agreed to in a written amendment to the contract signed by the state; (2) Contractor breaches any warranty or fails to perform or comply with any term or agreement in the contract; (3) Contractor makes any general assignment for the benefit of creditors; (4) in the state's sole opinion, Contractor becomes insolvent or in an unsound financial condition so as to endanger performance hereunder; (5) Contractor becomes the subject of any proceeding under any law relating to bankruptcy, insolvency or reorganization, or relief from creditors and/or debtors; (6) any receiver, trustee, or similar official is appointed for Contractor or any of the Contractor's property; (7) Contractor is determined to be in violation of federal, state or local laws or regulations and that such determination, in the state's sole opinion renders the Contractor unable to perform any aspect of the contract.

B. Default: A contractor may be declared in default for failing to perform a contractual requirement or for a material breach of any term or condition.

C. Termination for Convenience: The state may terminate this contract, in whole or in part, at any time and for any reason by giving thirty (30) calendar days written termination notice to Contractor. Termination charges shall not apply unless they are subsequently agreed upon by both parties. Where termination charges are application, both parties agree to negotiate in good faith and to limit the extent of negotiations to valid documented expenses incurred by Contractor prior to date of termination. Should the parties not agree to a satisfactory settlement, the matter may be subjected to mediation and/or legal proceedings.

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D.Termination for Breach and/or Default: Except in the case of delay or failure resulting from circumstances beyond the control and without the fault or negligence of the Contractor or of the Contractor's suppliers or subcontractors, the state shall be entitled, by written or oral notice, to cancel and/or terminate this contract in its entirety or in part for breach and/or for default of any of the terms herein and to have all other rights against Contractor by reason of the Contractor's breach as provided by law.

E.Termination by Mutual Agreement: The state or the Contractor may terminate this contract in whole or in part, at any time, by mutual agreement with thirty (30) calendar days written notice from one party to another.

F.Sanctions: Any violations of the mandatory provisions of this contract shall be a material breach of contract for which the contractor may be subject to a requirement of specific performance, or damages and sanctions provided by contract, by RCW 39.19.090, or by other applicable laws.

34. OPPORTUNITY TO CURE DEFAULT

A. Events: In the event that Contractor fails to perform a contractual requirement or materially breaches any term or condition, the state may issue a written or oral notice of default and provide a period of time in which Contractor shall have the opportunity to cure. Time allowed for cure shall not diminish or eliminate Contractor's liability for liquidated or other damages. The state is not required to allow the Contractor to cure defects if the opportunity for cure is not feasible as determined solely by the state. The state may terminate the contract for nonperformance, breach or default without allowing the opportunity to cure by the Contractor.

B.Remedies: If the nonperformance, breach or default remains after Contractor has been provided the opportunity to cure, the state may do one or more of the following:

1. Exercise any remedy provided by law
2. Terminate this contract and any related contracts or portions thereof
3. Impost liquidated damages
4. Suspend Contractor from receiving future Invitations for Bid

35. LEGAL FEES

The Contractor covenants and agrees that in the event suit is instituted by the purchaser for any nonperformance, breach or default on the part of the Contractor, and the Contractor is adjudged by a court of competent jurisdiction, he shall pay to the purchaser all costs, expenses expended or incurred by the purchaser in connection therewith, and reasonable attorney's fees.

36. FORCE MAJEURE

Definition: Except for payment of sums due, neither party shall be liable to the other or deemed in default under this contract if and to the extent that such party's performance of this contract is prevented by reason of force majeure. The term "force majeure" means an occurrence that is beyond the control of the party affected and could not have been avoided by exercising

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reasonable diligence. Force majeure shall include acts of God, war, riots, strikes, fire, floods, epidemics, or other similar occurrences.

Notification: If either party is delayed by force majeure, said party shall provide written notification within forth-eight (48) hours. The notification shall provide evidence of the force majeure to the satisfaction of the other party. Such delay shall cease as soon as practicable and written notification of same shall be provided. The time of completion shall be extended by contract modification for a period of time equal to the time that the results or effects of such delay prevented the delayed party from performing in accordance with this contract.

Rights Reserved: The state reserves the right to cancel the contract and/or purchase materials, equipment or services from the best available source during the time of force majeure, and Contractor shall have no recourse against the state.

37. MINORITY AND WOMEN'S BUSINESS ENTERPRISES (MWBE)

In accordance with the legislative findings and policies set forth in Chapter 39.19 RCW the State of Washington encourages participation in all its contracts by MWBE firms certified by the Office of Minority and Women's Business Enterprises (OMWBE). Participation may be either on a direct basis in response to the solicitation/invitation or as a subcontractor to a Bidder/Proposer. However, unless required by federal statutes, regulations, grants, or contract terms referenced in the contract documents, no preference will be included in the evaluation of bids/proposals, no minimum level of MWBE participation shall be required as condition for receiving an award and bids/proposals will not be rejected or considered non-responsive on that basis. Any affirmative action requirements set forth in federal regulations or statutes included or referenced in the contract documents will apply. Bidders may contact OMWBE at 360-753-9693 to obtain information on certified firms for potential subcontracting arrangements.

38. ESTABLISHED BUSINESS

To be considered responsive, contractor must, prior to commencing performance, or prior to that time if required by law or regulation (reference WAC Chapter 18.27), be an established business firm with all required licenses, bonding, facilities, equipment and trained personnel necessary to perform the work as specified in the bid solicitation. All bidders must have Federal Tax Identifier Number as required by IRS regulations and Uniform Business Identifier Number required by Department of Revenue (800) 647-7706. Questions regarding specific licenses should be directed to Department of Licensing at (360) 664-1400.

The state reserves the right to require proof of said requirements including business references within ten (10) calendar days from the date of request.

39. LOWEST COST PURCHASE AUTHORITY (THIS PARAGRAPH APPLIES ONLY TO MANDATORY USE TERM CONTRACTS)

This contract is subject to RCW 43.19.190(2) and RCW 43.19.1905(7): which authorizes state agencies to purchase materials, supplies, services, and equipment of equal quantity and quality to those on state contract from non-contract suppliers, provided that an agency subsequently notifies the Office of State Procurement (OSP) State Procurement Officer (SPO) that the pricing is less costly for such goods or services than the price from the state contractor.

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If the non-contract supplier's pricing is less, the state contractor shall be given the opportunity by the state agency to at least meet the non-contractor's price. If the state contractor cannot meet the price, then the state agency shall purchase the item(s) from the non-contract supplier, document the transactions on the appropriate form developed by OSP and forwarded to the SPO administering the state contract.

If a lower price can be identified on a repeated basis, the state reserves the right to renegotiate the pricing structure of this agreement. In the event such negotiations fail, the state reserves the right to delete such item(s) from the contract.

40. INSURANCE COVERAGE

The Contractor is to furnish COMMERCE with a certificate of insurance executed by a duly authorized representative of each insurer, showing compliance with the insurance requirements set forth below.

The Contractor shall, at Contractor's own expense, obtain and keep in force insurance coverage, which shall be maintained in full force and effect during the term of the contract. The Contractor shall furnish evidence in the form of a Certificate of Insurance that insurance shall be provided, and a copy shall be forwarded to COMMERCE within fifteen (15) days of the contract effective date.

Liability Insurance

Commercial General Liability Insurance (CGL): Contractor shall maintain general liability insurance and, if necessary, commercial umbrella insurance, with a limit of not less than \$1,000,000 per each occurrence. If CGL insurance contains aggregate limits, the general aggregate limit shall be at least twice the "each occurrence" limit. CGL insurance shall have products-completed operations aggregate limit of at least two times the "each occurrence" limit. CGL insurance shall be written on ISO occurrence form CG 00 01 (or a substitute form providing equivalent coverage). All insurance shall cover liability assumed under an insured contract (including the tort liability of another assumed in a business contract), and contain separation of insureds (cross liability) condition.

Additionally, the Contractor is responsible for ensuring that any subcontractors provide adequate insurance coverage for the activities arising out of subcontracts.

Business Auto Policy: As applicable, the Contractor shall maintain business auto liability and, if necessary, commercial umbrella liability insurance with a limit not less than \$1,000,000 per accident. Such insurance shall cover liability arising out of "Any Auto." Business auto coverage shall be written on ISO form CA 00 01, 1990 or later edition, or substitute liability form providing equivalent coverage.

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Employers Liability ("Stop Gap") Insurance

In addition, the Contractor shall buy employers liability insurance and, if necessary, commercial umbrella liability insurance with limits not less than \$1,000,000 each accident for bodily injury by accident or \$1,000,000 each employee for bodily injury by disease.

Additional Provisions

Above insurance policy shall include the following provisions:

- **Additional Insured.** COMMERCE, its elected and appointed officials, agents and employees shall be named as an additional insured on all general liability, excess, umbrella and property insurance policies. All insurance provided in compliance with this contract shall be primary as to any other insurance or self-insurance programs afforded to or maintained by the state.
- **Cancellation.** COMMERCE shall be provided written notice before cancellation or non-renewal of any insurance referred to therein, in accord with the following specifications. Insurers subject to 48.18 RCW (Admitted and Regulation by the Insurance Commissioner): The insurer shall give the state 45 days advance notice of cancellation or non-renewal. If cancellation is due to non-payment of premium, the state shall be given 10 days advance notice of cancellation. Insurers subject to 48.15 RCW (Surplus lines): The state shall be given 20 days advance notice of cancellation. If cancellation is due to non-payment of premium, the state shall be given 10 days advance notice of cancellation.
- **Identification.** Policy must reference COMMERCE's contract number and state name.
- **Insurance Carrier Rating.** All insurance and bonds should be issued by companies admitted to do business within the state of Washington and have a rating of A-, Class VII or better in the most recently published edition of Best's Reports. Any exception shall be reviewed and approved by COMMERCE, the risk manager for the state of Washington, before the contract is accepted or work may begin. If an insurer is not admitted, all insurance policies and procedures for issuing the insurance policies must comply with Chapter 48.15 RCW and 284-15 WAC.
- **Excess Coverage.** By requiring insurance herein, the state does not represent that coverage and limits will be adequate to protect Contractor, and such coverage and limits shall not limit Contractor's liability under the indemnities and reimbursements granted to the state in this contract.

Workers' Compensation Coverage

The Contractor will at all times comply with all applicable workers' compensation, occupational disease, and occupational health and safety laws, statutes, and regulations to the full extent applicable. The state will not be held responsive in any way for claims filed by the Contractor or their employees for services performed under the terms of this contract.